

1988

# Jack D. Cooper v. Deseret Federal Savings and Loan Association : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Joseph E. Hatch; Garrett & Sturdy; attorneys for defendant - appellant.

Heber Grant Ivins; attorney for plaintiff- respondent.

---

## Recommended Citation

Brief of Appellant, *Cooper v. Deseret Federal Savings*, No. 880028.00 (Utah Supreme Court, 1988).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/1884](https://digitalcommons.law.byu.edu/byu_sc1/1884)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT

(F U

0

110

DOCKET NO. 880028-CA THE SUPREME COURT OF THE STATE OF UTAH

JACK D. COOPER,

Plaintiff/Respondent,

vs.

DESERET FEDERAL SAVINGS AND  
LOAN ASSOCIATION,

Defendant/Appellant.

Case No. 20703

88-0028-CA

BRIEF OF APPELLANT  
DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION

APPEAL FROM THE JUDGMENT OF THE FOURTH  
JUDICIAL DISTRICT COURT OF UTAH COUNTY,  
STATE OF UTAH, HONORABLE GEORGE E. BAILIF

Heber Grant Ivins  
75 North Center Street  
American Fork, Utah 84003

Attorney for  
Plaintiff-Respondent

Joseph E. Hatch  
GARRETT & STURDY  
311 South State Street  
Suite 320  
Salt Lake City, Utah  
84111

Attorneys for  
Defendant-Appellant

**FILED**  
FEB 27 1986

Clerk, Supreme Ct

IN THE SUPREME COURT OF THE STATE OF UTAH

---

JACK D. COOPER,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	Case No. 20703
	)	
DESERET FEDERAL SAVINGS AND	)	
LOAN ASSOCIATION,	)	
	)	
Defendant/Appellant.	)	

---

BRIEF OF APPELLANT  
DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION

---

APPEAL FROM THE JUDGMENT OF THE FOURTH  
JUDICIAL DISTRICT COURT OF UTAH COUNTY,  
STATE OF UTAH, HONORABLE GEORGE E. BALLIF

---

Heber Grant Ivins  
75 North Center Street  
American Fork, Utah 84003  
  
Attorney for  
Plaintiff-Respondent

Joseph E. Hatch  
GARRETT & STURDY  
311 South State Street  
Suite 320  
Salt Lake City, Utah  
84111

Attorneys for  
Defendant-Appellant

## TABLE OF CONTENTS

	<u>Pages</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
Point I: Deseret Federal Timely Accelerated its Loan Following a Violation in the Loan's "Due-on-Sale" Clause	7
Point II: There is no Statutory or Contractual Basis for Plaintiff's Award of Attorney's Fees	13
CONCLUSION	14
APPENDIX	
A. Paragraph 17, "Due-on-Sale" Clause	16
B. Decision	17
C. Findings of Fact and Conclusions of Law	26
D. Judgment	31

## TABLE OF AUTHORITIES

	<u>Page</u>
 CASES CITED:	
<u>B &amp; R Supply Company v. S. M. Bringham</u> , 28 U.2d 442, 502 P.2d 1216 (1972)	13
<u>Bakker v. Empire Savings and Loan Association</u> , 634 P.2d 1021 (Colo., 1981)	11
<u>F.M.A. Financial Corporation v. Build, Inc.</u> , 17 U.2d 80, 404 P.2.2d 670 (1965)	9
<u>Fidelity Federal Savings &amp; Loan Association v. Reginald D. Re Sa Cuesta</u> , 458 U.S. 141 (1982)	7
<u>J. P. Koch, Inc. v. J. C. Penney Company, Inc.</u> , 534 P.2d 903 (Utah, 1975)	11
<u>Malouff v. Midland Federal Savings and Loan Association</u> , 509 P.2d 1240 (Colo., 1973)	9
<u>Phoenix Ins. Co. v. Healths</u> , 90 Ut 187, 61 P.2d 308 (1936)	10
<u>Redd v. Western Savings and Loan Company</u> , 646 P.2d 761 (Utah, 1982)	7
 STATUTES CITED:	
11 U.S.C. § 362(a)(4)	4, 5
U.C.A. §§ 57-1-19, et. seq.	8
U.C.A. § 57-1-34	8, 9
U.C.A. § 78-12-23(2)	8, 9

IN THE SUPREME COURT OF THE STATE OF UTAH

---

JACK S. COOPER,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	
	)	Case No. 20703
DESERET FEDERAL SAVINGS AND	)	
LOAN ASSOCIATION,	)	
	)	
Defendant/Appellant.	)	

---

BRIEF OF APPELLANT  
DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION

---

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant presents two issues for review by this Court:

1. Did the District Court err when it ruled that a lender must commence foreclosure within one (1) year after learning of a violation of the "due-on-sale" clause contained in the lender's Deed of Trust?

2. Did the District Court err when it held that there were legal grounds for an award of attorney's fees to Plaintiff/Respondent?

STATEMENT OF CASE

On June 5, 1984, the Appellant, Deseret Federal Savings and Loan Association (hereinafter referred to as "Deseret Federal"), recorded a Notice of Default affecting real property located in Utah County, Utah. The Notice of Default alleged a violation in the "due-on-sale" clause

contained in Deseret Federal's Deed of Trust securing the subject real property. (R.7-8). On August 29, 1984, the Respondent, Jack S. Cooper (hereinafter referred to as "Cooper"), filed a Complaint in Fourth Judicial District Court seeking an injunction to enjoin Deseret Federal from foreclosing under the recorded Notice of Default. (R.1-6). A non-jury trial was held on February 28, 1985. The Court took the matter under advisement. (R.91-95). On April 5, 1985, the Court rendered its Decision that Cooper was entitled to a permanent injunction against Deseret Federal, plus his costs and reasonable attorney's fees. (R.143-150). Findings of Fact, Conclusions of Law, and Judgment reflecting the Court's decision were entered on May 17, 1985. (R.153-160). It is from that Judgment that Deseret Federal now appeals by seeking a reversal. (R.163-164).

#### STATEMENT OF FACTS

Deseret Federal was the beneficiary and trustee under a Deed of Trust executed by Cooper and his wife on April 15, 1976. The Deed of Trust secured a Trust Deed Note in the amount of \$315,000.00 by transferring, in trust, real property located in Utah County, Utah. (R.58-62). The real property is an apartment complex located at 625 North Monterey Drive, Orem, Utah. (R. 177-178).

Contained in the subject Deed of Trust is a paragraph commonly referred to as a "due-on-sale" clause. The paragraph reads, in pertinent part, as follows:

If all or any part of the property or an interest therein is sold or transferred by

Borrower without Lender's prior written consent....., Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. (R.61).

(A complete copy of the subject "due-on-sale" clause is attached hereto as Appendix "A").

Cooper sold the subject real property to a Gary Douglas Ford (hereinafter referred to as "Ford") by Uniform Real Estate Contract in May of 1978. Neither Cooper, nor Ford, obtained the "prior written consent" of Deseret Federal for the sale. (R.144). Thus, the May, 1978 sale of the apartment complex violated the "due-on-sale" clause contained in Deseret Federal's Deed of Trust.

Deseret Federal was first informed of a transfer of Cooper's apartment complex when the lender received an insurance binder naming Ford as the owner in April of 1979.

(R.154). Deseret Federal was also informed of the transfer through communications which occurred between Ford, Cooper and employees of Deseret Federal throughout the year 1981. (R.154).

In June of 1981, Deseret Federal made the decision to accelerate the obligation secured by the Deed of Trust by reason of the default caused by the transfer of the apartment complex from Cooper to Ford. A letter declaring such an acceleration was mailed on or about June 22, 1981. However, neither Cooper, nor Ford, claimed the mailed letter. (R.53-54, 65-66). A follow-up letter was sent to Cooper and Ford on or about August 18, 1981, which again



stated Deseret Federal's desire to accelerate the subject loan. (R.144 and Defendant's Exhibit #16).

Sometime after mailing the August 18, 1981 letter, Deseret Federal began holding discussions with Ford about assuming the Cooper loan. In December of 1981, Ford made formal application with Deseret Federal to assume the loan. (R.144). Negotiations between Ford and Deseret Federal continued. Terms of the Ford assumption were completed sometime in the Spring of 1982. A critical part of assumption was that Cooper would transfer to Ford any escrow funds Deseret Federal held in connection with the subject loan. Papers were drafted to consummate the assumption. However, in May of 1982, Cooper refused to consent to a transfer of the escrow funds to Ford. Thus, the "due-on-sale" assumption loan by Ford and resulting "cure" of the defaulted clause failed to occur. (R.284-288).

By Spring of 1982, an additional default in the terms of Deseret Federal's loan had occurred. Payments of principal and interest on the Trust Deed Note had become delinquent. Further, Ford had failed to make timely payments to Cooper pursuant to their Uniform Real Estate Contract. On October 1, 1982, Ford filed a petition in bankruptcy under Chapter 11 of the Pankruptcy Code. (R.144-145). As a result thereof, both Deseret Federal and Cooper were automatically stayed from foreclosing their respective interests in the apartment complex. 11 U.S.C. § 362(a)(4).

On or about September 18, 1983, the Bankruptcy Court entered an Order modifying the Bankruptcy Court's automatic stay and permitting Cooper to complete foreclosure of his Uniform Real Estate Contract on the subject apartment complex. An action to foreclose said contract had been filed by Cooper against Ford in the Fourth Judicial District Court. (R.71-73). The Cooper foreclosure was completed on February 1, 1984 when Cooper purchased the apartment complex at sheriff's sale. (R.155). As a result of the sheriff's sale, the bankruptcy stay no longer prevented Deseret Federal from enforcing its rights under the subject Deed of Trust by foreclosure since the apartment complex was no longer property of the Ford bankruptcy estate. 11 U.S.C. §362(a).

On February 10, 1984, Deseret Federal, by letter, again asserted its right to accelerate the loan by reason of the default in the "due-on-sale" clause. (R.67-68). That on or about April 16, 1984, Cooper tendered to Deseret Federal sufficient funds to bring the payments of principal, interest and escrow current on the subject loan. However, the tender was conditioned upon Deseret Federal waiving the provisions of the "due-on-sale" clause. Thus, the tender was refused. (R.155, 325-332). Cooper did bring the payments of interest and principal current unconditionally during the course of this litigation. (R.156).

Deseret Federal and Cooper were unable to resolve their dispute over the "due-on-sale" violation. Thus, Deseret

Federal recorded a Notice of Default on June 5, 1984. (R.69-70). Cooper filed a Complaint against Deseret Federal requesting an injunction to prevent Deseret Federal from foreclosing its Deed of Trust by reason of the default under the "due-on-sale" clause. The District Court granted such an injunction and awarded Cooper his costs and attorney's fees. (R.159-160).

Deseret Federal here seeks a reversal of the District Court's Judgment. Such a reversal would allow Deseret Federal to accelerate the subject loan by reason of the "due-on-sale" clause violation, to complete the foreclosure process and collect its reasonable attorney's fees.

#### SUMMARY OF ARGUMENT

After the transfer of the subject real property had occurred in violation of the "due-on-sale" clause contained in Deed of Trust, Deseret Federal timely accelerated the subject loan by commencing a non-judicial foreclosure of the Deed of Trust. The District Court erred when it ruled that Deseret Federal must commence foreclosure of the subject loan within one year after being informed of a violation in the "due-on-sale" clause under the Deed of Trust. Further, the District Court erred when it held that there were sufficient legal grounds for the awarding of attorney's fees to Cooper. There is no statutory or contractual basis for such an award.

## ARGUMENT

### POINT I: DESERET FEDERAL TIMELY ACCELERATED ITS LOAN FOLLOWING A VIOLATION IN THE LOAN'S "DUE-ON-SALE" CLAUSE.

Many Courts have recently had the opportunity to redefine the law regarding enforceability of and interpretation of "due-on-sale" clauses contained in Deeds of Trust. In a very thoughtful analysis, this Court held in Redd v. Western Savings and Loan Company, 646 P.2d 761 (Utah, 1982), that absent legislative restrictions, a "due-on-sale" clause is enforceable as part of a bargained agreement. Since Deseret Federal is a federally chartered savings and loan association, any legislative restriction to the effectiveness of the "due-on-sale" clause contained in the subject Deed of Trust must be found in federal law. See Fidelity Federal Savings and Loan Association v. Peginald D. De Sa Cuesta, 458 U.S. 141 (1982).

Legislative restrictions to enforceability of "due-on-sale" clauses were not the basis of Plaintiff Jack S. Cooper's complaint against Deseret Federal. Instead, Cooper argued that Deseret Federal waited too long to accelerate its loan because of the default in the "due-on-sale" clause; and thus, by reason of laches, estoppel and/or waiver, Deseret Federal is now barred from accelerating the loan. Conversely, Deseret Federal argues that it timely accelerated the subject loan after learning of the real property transfer from Cooper to Ford. The District Court concluded that Deseret Federal should have recorded its

Notice of Default, accelerating the loan, within one year after learning of the offensive transfer. Such a conclusion is reversible error.

The recording of a Notice of Default, along with all non-judicial foreclosure procedures, is governed by Utah's Trust Deed Statute, U.C.A. §§57-1-19, et. seq. (1953, as amended). That statute provides the specific time frame within which a lender must record a Notice of Default. U.C.A. §57-1-34 reads as follows:

The trustee's sale of property under a trust deed shall be made, or an action to foreclosure a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed. [Emphasis added].

The obligation secured by the subject Deed of Trust is a Trust Deed Note, a written obligation. Thus, the time by which Deseret Federal must conduct its trustee's sale under the recorded Notice of Default is governed by U.C.A. §78-12-23(2), which reads as follows:

Within six years - Within six years...  
(2) An action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section.

Because Deseret Federal first learned of the default by Cooper of the "due-on-sale" clause in April, 1979, Deseret Federal would have, by reason of the appropriate Statute of Limitations, until April, 1985, to conduct its trustee's sale. Further, this period of time was tolled because

Deseret Federal has been enjoined from conducting a trustee's sale by the District Court since September 2, 1984 and Deseret Federal was stayed by Ford's Bankruptcy from recording a Notice of Default between October 1, 1982 and February 1, 1984.

Cooper has asserted that the doctrine of laches, not the Statute of Limitations, restricts the time within which Deseret Federal must accelerate its loan. See Malouff v. Midland Federal Savings and Loan Association, 509 P.2d 1240 (Colo., 1973). However, such an argument is counter to Utah case law. In F.M.A. Financial Corporation v. Build, Inc., 17 U.2d 80, 404 P.2d 670, (1965), the Plaintiff had filed a mortgage foreclosure action against Defendant. The Defendant raised the doctrine of laches as a defense to the mortgage foreclosure. This Court rejected such a defense and held:

Neither is the defense of laches of any avail to the defendant. Sec. 78-12-23, U.C.A. 1953, which provides for a six year statute of limitations on obligations in writing is applicable to the promissory note and to the mortgage. It had two years yet to run when this action was commenced. Even though the foreclosure action is equitable in nature, it is practically the invariable rule that laches cannot be a defense before the statutory limitations has expired. 404 P.2d at 673.

The legislature had established what it felt to be a "reasonable time" within which a lender must commence a non-judicial foreclosure when it enacted U.C.A. §57-1-34 and §78-12-23. It is inappropriate for a Court to substitute its concept of a "reasonable time" for that of the

legislature. Yet, that is exactly what the District Court did when it ruled that Deseret Federal should have recorded its Notice of Default within one(1) year of learning of the subject property transfer . Thus, this Court should reverse the District Court's Judgment.

During the course of litigation on this matter, Cooper has often used the terms "waiver", "estoppel" and "laches" as if these concepts were interchangeable. In fact, these legal concepts are very different. However, it is Deseret Federal's position that the facts as found by the District Court support a conclusion that Deseret Federal did not waive its rights under the subject "due-on-sale" clause and that Deseret Federal is not estopped from asserting its rights under that clause.

This Court has defined waiver in the case of Phoenix Ins. Co. v. Health, 90 Ut 187, 61 P.2d 308 (1936). In that case, the Court held:

A waiver is the intentional relinquishment of a known right...To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence and an intention to relinquish it. It must be distinctly made, although it may be express or implied. 61 P.2d 312.

The evidence before the District Court clearly indicates that Deseret Federal took express steps to demonstrate that it was not going to waive its rights under the "due-on-sale" clause. At every opportunity, Deseret Federal stated that it had accelerated the subject loan by

reason of default under the "due-on-sale" clause. The only evidence that Cooper presented in support of his claim that Deseret Federal waived its rights under the clause is the fact that Deseret Federal had accepted payments of principal and interest under the subject note after having accelerated the loan. However, the mere acceptance of principal and interest payments is not a waiver of any rights under a "due-on-sale" clause. Bakker v. Empire Savings and Loan Association, 634 P.2d 1021 (Colo., 1981).

The doctrine of estoppel, like the doctrine of waiver, applies only when certain criteria are satisfied. This Court described the doctrine of estoppel in J. P. Koch, Inc. v. J. C. Penney Company, Inc., 534 P.2d 903 (Utah, 1975), as follows:

It is a doctrine of equity to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss. On applicable here, the test is whether there is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation. 534 P.2d 905.

The only conduct of Deseret Federal for which this doctrine could apply is the fact that Deseret Federal did not choose to accelerate the loan between April, 1979 and June, 1981. However, there is no evidence of record to show how Cooper relied upon said lack of acceleration or to show how Cooper changed his position because of such conduct which would result in his detriment. In fact, Cooper argued



at time of trial that he did not have to prove that he was "harmed" by the delay. (R. 385-386). This is not the law of estoppel. Thus, it is clear from the evidence that neither the doctrine of estoppel or waiver is applicable to the case at hand.

A sad effect of the District Court's ruling in this matter is that it discourages negotiations between parties. Deseret Federal negotiated with Ford and Cooper between September, 1981 and May, 1982 for the purposes of consummating an assumption of the subject loan by Ford. The negotiations ended when Cooper refused to assign his interest in an escrow account to Ford. During that period of time, Deseret Federal did not record a Notice of Default, nor refer the matter to an attorney for resolution. (R.283-284). However, it would now be more prudent for lenders to record their Notices of Default immediately upon learning of a default in a "due-on-sale" clause and then negotiate with these various parties. Of course, this would add to the expenses of an assumption.

Because of the transfer of the subject real property from Cooper to Ford, Deseret Federal was within its rights to accelerate the loan. Relying exclusively upon the passing of time, Cooper argued that Deseret Federal is barred from asserting its rights under a "due-on-sale" clause because of laches, waiver and/or estoppel. However, the Utah legislature has specified a six(6) year limitation

for lenders accelerating their loans. Deseret Federal clearly acted within the statutory time constraint when it recorded its Notice of Default. Therefore, this Court should reverse the District Court's judgment and order a dismissal with prejudice of Cooper's complaint.

POINT II: THERE IS NO STATUTORY OR CONTRACTUAL  
BASIS FOR PLAINTIFF'S AWARD OF ATTORNEY'S FEES

Under the "American Rule", a litigant is only entitled to an award of attorney's fees if a statute or contract so provides. B & R Supply Company v. S. M. Bringham, 28 U.2d 442, 503 P2d 1216 (1972). The District Court awarded Cooper an attorney's fee of \$3,840.00. However, there is no evidence in the record to support a legal basis for this award.

The District Court in its Decision and Conclusions of Law makes no reference to statutory authority for an award of attorney's fees. Cooper's counsel has not pointed to any controlling statute which would allow such an award. Deseret Federal's review of the record and statutes can determine no conceivable basis for the District Court's award.

The contract between Deseret Federal and Cooper consists of two (2) documents, a Deed of Trust and Trust Deed Note. Both of these documents provided attorney's fees for Deseret Federal. Neither of these documents provide for attorney's fees for Cooper.

The language which permits Deseret Federal to collect its attorney's fees is contained in paragraph 18 of the Deed of Trust which reads as follows:

Trustee [Deseret Federal] shall apply the proceeds of the Sale in the following order: (a) to all reasonable costs and expenses of the sale, including, but not limited to, reasonable Trustee's and attorney's fees and costs of title evidence...

The remedies provided to Deseret Federal in paragraph 18 are specifically referred to in the "due-on-sale" clause (paragraph 17). Additionally, paragraph 18 provides:

Lender [Deseret Federal] shall be entitled to collect all reasonable costs and expenses incurred in pursuing the remedies provided in this paragraph 18, including, but not limited to, attorney's fees.

None of the wording in either the Deed of Trust or the Trust Deed Note provides an award of attorney's fees to a borrower. Cooper cannot rely upon a contract for an award of attorney's fees.

Since there is neither statutory authority, nor a contractual basis for an award of attorney's fees to Cooper, the District Court's judgment is in error. Deseret Federal seeks reversal.

#### CONCLUSION

Cooper was granted an injunction to prevent Deseret Federal from foreclosing a Deed of Trust because of an admitted default in "due-on-sale" clause. Deseret Federal respectfully requests this Court to reverse the District

Court's injunction and order a dismissal with prejudice of Cooper's complaint. A reversal will permit Deseret Federal to accelerate the Cooper loan and complete its non-judicial foreclosure. Further, Cooper was awarded a judgment against Deseret Federal for his attorney's fees. Deseret Federal also requests a reversal of this judgment.

Respectfully submitted this \_\_\_\_\_ day of February, 1986.

GARRETT AND STURDY

---

Joseph E. Hatch  
Attorney for Appellant

## APPENDIX "A"

17. Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof.

APPENDIX "B"

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH  
-----

JACK S. COOPER,

Civil No. 67397

Plaintiff,

vs.

D E C I S I O N

DESERET FEDERAL SAVINGS  
& LOAN ASSOCIATION,

Defendant.  
-----

This matter came before the Court for trial on the 28th day of February, 1985. H. Grant Ivins, Esq. appeared for the plaintiff and Joseph E. Hatch, Esq. appeared for the defendant. The parties presented their evidence and oral arguments to the Court, which directed that formal citations of authority be submitted by Mr. Hatch allowing time for Mr. Ivins to answer if deemed appropriate, and the Court having received such citations and further argument from Mr. Hatch and having taken the matter under advisement, now enters its:

DECISION

There is very little dispute in the evidence. The following is a summary of the Court's findings.

The plaintiff, Jack S. Cooper, was the original borrower from defendant in April of 1976, at which time the trust deed securing the defendant's loan to Cooper contained the following covenant:

"17. Transfer of property; Assumption. If all or any part of the property or an interest therein is sold or transferred by borrower without lender's prior written consent, excluding . . . lender may at lender's option, declare all the sums secured by this deed of trust to be immediately due and payable . . . ."

In May of 1978 plaintiff sold by a Uniform Real Estate Contract to Gary Douglas Ford, trustee, the property in question, which secured the defendant's loan to Cooper. Neither plaintiff nor Ford obtained "prior written consent" for the sale.

In April, 1979, the file on this loan reflects an insurance binder being issued stating Ford to be the owner of the subject property. This binder was noted on an indexing card and the actual binder placed in the file. (Cooper also testified he and Ford talked to an official at Deseret Federal about the sale going through and no one advised that a due-on-sale clause would be involved.)

In June, 1981, Ford was delinquent both to Deseret Federal on the original loan, and to Cooper on the real estate contract (or second mortgage), and a due-on-sale notice was mailed to Cooper, which Cooper denies having received, and for which defendant cannot produce proof of mailing. (Undelivered Certified Mail dated August 18, apparently with a notice of due-on-sale claim was undelivered and apparently addressed to a questionable location in Orem, Utah).

Defendant continued to meet with Ford to work out his assumption of the loan to cure the due-on-sale requirement and in December, 1981 Ford made a formal application for the assumption of the subject loan. Continued negotiations occurred, and in May, when plaintiff was asked

to release his escrowed funds to apply on Ford's delinquencies to defendant, Cooper refused.

Nothing further appears to have occurred concerning this matter until October 1, 1982, when Ford filed a Chapter 11 bankruptcy. Thereafter plaintiff made efforts to and finally did obtain a release of the property from the bankruptcy court on or about September 18th, 1983, and Cooper completed his foreclosure on or about February 1, 1984, when he was the successful bidder at the Sheriff's sale and title to the property subject to the trust deed in question was vested back in him.

On February, 10, 1984, Deseret Federal sent to and Jack Cooper received a letter notifying him of their awareness of the sale of the subject property (to Ford in 1978) and a declaration of defendant's election to declare the entire balance (\$295,247.42) due and payable pursuant to paragraph 17 of the trust deed. The notice provided two alternatives to foreclosure, which was indicated would be commenced within thirty days if neither remedies there set forth were "chosen".

In June, 1984, Deseret Federal recorded its Notice of Default covering the due-on-sale clause, to begin its non-judicial trust deed s

The Court also finds from the evidence presented that during the course of this litigation and with some reservation between counsel that it would not have an effect on the waiver claimed by the plaintiff substantial money has been paid to defendant by plaintiff in an effort to bring the loan in question current. It is also part of the record in this proceeding that a tender has been made to defendant by plaintiff of some \$77,000.00 in addition to the \$101,955.00 paid on



December 27, 1984 to bring the loan fully current as of a point after litigation had commenced.

It is the plaintiff's position that the failure of the defendant to make an election to declare the loan due and payable because of the sale to Ford for a period of approximately five years counting the period of the bankruptcy, constitutes a waiver of the right to avail itself of that provision in the trust deed.

It is the position of the defendant that after a sale they have the right at any time within the period of the loan to exercise the due-on-sale provision when such sale is contrary to the restrictions of paragraph 17.

In resolving the issues, the Court enters the following Conclusions of Law from the above Findings of Fact:

1. That the due-on-sale provision in the trust deed securing defendant's loan to plaintiff became operative as of the sale to Ford in May of 1978.

2. That the defendant had actual or constructive notice of the aforesaid sale to Ford as of April, 1979, when it received notice of the change of owners through an insurance binder.

3. That further notice of the sale was brought to the attention of defendant through conversations between Mr. Ford and Mr. Cooper with agents of defendant over a period of 1981, which resulted in letters from

defendant to Cooper dated June 22, 1981, and August 14, 1981. Also, conversations with Jean Carter and Ford in October and other communications with Ford in November and December, 1981, and January and May of 1982, clearly establish the knowledge on the part of defendant that the sale had occurred and their option to exercise due-on-sale, or affect other remedies had matured.

4. The due-on-sale provision in Section 17 of the trust deed is a provision entitling the lender to accelerate the unpaid balance of an installment loan when a sale occurs.

5. The Court concludes that to fail to exercise the due-on-sale clause of the trust deed by recording the Notice of Default and initiating either judicial or non-judicial trust deed foreclosure within one year after notice of a sale in violation of the due-on-sale provision is not exercising the option within a reasonable time, which the law would require, since no other time provision for the exercise is specified in the trust deed.

6. The Court further concludes that the failure of defendant to accelerate the obligation under the due-on-sale clause until after plaintiff had foreclosed the rights of Ford and had succeeded to title to the property affects a waiver of defendant's rights to proceed under the due-on-

sale clause, and in addition thereto amounts to an estoppel against defendant to proceed to foreclose at this time.

Defendant had knowledge of its right to accelerate the obligation as of April, 1979 and repeatedly thereafter through the time plaintiff foreclosed against Ford, and intentionally sat back, negotiated, but but did not choose to assert its right while allowing the plaintiff to proceed with the expenditure of time and legal costs to protect his interests in the property.

The Court has reviewed the decisions cited by counsel, and although none of them appear to show as extreme fact situation as is evident in the case before the Court, there are many decisions concerning what constitutes a reasonable time to exercise the right to accelerate an obligation due to the violation of a provision in a trust deed or mortgage, and the periods involved in the case before the Court run well beyond what the decisions say a reasonable time is where time is not otherwise limited in the written documents. The case of Malouff v. Midland Federal Saving and Loan Association (1973), 181 Col. 294, 509 P. 2d 1240, holds that ". . . under an ordinary acceleration clause in a mortgage or trust deed, the obligee has a reasonable time after the default or the event which gives rise to the right to accelerate." Even though that case directs a case-by-case determination as to what a reasonable time is, the circumstances of the case before this Court would indicate a clear violation of a reasonable time to accelerate under such a clause, be it due-on-sale or

other default in the security documents of a loan.


Other cases cited by counsel for the plaintiff are most persuasive to the Court and whether the conduct in not exercising the acceleration within a reasonable time constitutes a waiver, amounts to an estoppel or assesses laches against the party whose actions are tardy, a particular analysis of the fact of this case would indicate a clear conclusion that defendants waited too long. The rights accorded a lender by virtue of due-on-sale clause does not include carte blanche on a particular loan to watch the entire climate of interest rates for a thirty year period and at some likely point deemed most advantageous to the lender, require an adjustment or foreclosure from the borrower.

Based on the foregoing the Court concludes that plaintiff is entitled to the relief requested in his Complaint prohibiting the defendant from proceeding in its attempt to exercise its due-on-sale clause for the sale occurring in 1978, and that the defendant be Ordered to accept plaintiff's tender to bring the loan current and that he not be charged any penalty interest or late charges from the date of his tender of the balance to accomplish that, which was on the 16th day of April, 1984. [The Court further finds that the plaintiff is entitled to be compensated for the fees and charges of his attorney in this matter and the Affidavit filed by his counsel and not controverted by defense counsel establishes the sum of ~~\$3,840.00~~ as a reasonable sum to be awarded to the plaintiff for the use and benefit of his attorney, plus the costs of this action.

Counsel for plaintiff is directed to prepare appropriate Findings

of Fact, Conclusions of Law and Judgment and Order consistant with the foregoing Decision.

Dated at Provo, Utah County, Utah this 5<sup>TH</sup> day of April, 1985.

  
\_\_\_\_\_  
GEORGE E. BALLIF, JUDGE

APPENDIX "C"

HEBER GRANT IVINS  
Attorney for Plaintiff  
75 North Center  
American Fork, UT 84003  
Telephone: (801) 756-6071

IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR  
UTAH COUNTY, STATE OF UTAH

-ooo0ooo-

JACK S. COOPER,	)	
Plaintiff,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	)	
DESERET FEDERAL SAVINGS & LOAN ASSOCIATION,	)	Civil No. 67,397
Defendant.	)	

-ooo0ooo-

THIS MATTER came on regularly for trial on the 28th day of February, 1985; the plaintiff appearing in person and through his counsel, Heber Grant Ivins; the defendant appearing with officers of the corporation and through their counsel, Joseph E. Hatch; the parties presented evidence and oral arguments to the Court; and after due deliberation the Court does enter the following

FINDINGS OF FACT

1. That on April 15, 1976, the plaintiff borrowed the sum of \$315,000 from the defendant and executed a trust deed and a trust deed note, which, among other provisions, contained a non-assumption provision which read as follows:

"17. Transfer of property; Assumption. If all or any part of the property or an interest therein is sold or transferred by borrower without lender's prior written consent, excluding...lender may at lender's option, declare all the sums secured by this deed of trust to be immediately due and payable...."

2. In May, 1978, the plaintiff sold, by Uniform Real Estate Contract, the 24-unit apartment complex which was the collateral provided to the defendant, to one Gary Douglas Ford, and at the time of said sale, the due-on-sale provision in the trust deed, securing defendant's loan to plaintiff, became operative.

3. That the defendant had actual or constructive notice of the aforesaid sale to Ford in April, 1979, when it received notice of the change of owners through an insurance binder which was present in the file of the defendant.

4. That further notice of the sale was brought to the attention of the defendant through conversations between Gary Ford, the purchaser, and Mr. Cooper, with agents of the defendants throughout 1981, which resulted in letters from defendant to Cooper dated June 22, 1981, and August 14, 1981. Also, conversations were had with one Jean Carter, and agent of the defendant, and Gary Ford in October, 1981, and other communications with Ford occurred in November and December of 1981 and January and May of 1982, which clearly establishes knowledge on the part of the defendant that the sale had occurred and their option to exercise the due-on-sale provision or other remedies had matured.

5. That the due-on-sale provision in Section 17 of the trust deed is a provision entitling the lender to accelerate the unpaid balance of an installment loan when a sale occurs.

6. That the purchaser, Gary Ford, became delinquent on both the contract to the plaintiff and on the assumed obligation to the defendant, in early 1982.

7. That the plaintiff filed a foreclosure against Gary Ford on July 14, 1982, and the defendant was served with a copy of said foreclosure on July 9, 1982.

8. That the purchaser, Gary Ford, filed a Chapter 11 bankruptcy on October 1, 1982, which resulted in an automatic stay being issued by the bankruptcy court. The stay was set aside on September 18, 1983.

9. That the foreclosure action of the plaintiff against Gary Ford was completed and the property was sold by the sheriff of Utah County on February 1, 1984, and was purchased by the plaintiff at said sale.

10. That on or about February 10, 1984, defendant sent plaintiff a letter asserting a violation of the due-on-sale clause and accelerating the loan.

11. That on April 16, 1984, the plaintiff tendered to the defendant a check in the amount of \$77,813.00, which amount was represented to be sufficient to bring the plaintiff's note current.



12. That on June 5, 1984, the defendant recorded in the office of the Utah County Recorder its notice of default.

13. That on December 27, 1984, the plaintiff paid and the defendant accepted the sum of \$101,955.00, which brought the loan fully current as of that date.

14. That the plaintiff's counsel has expended a total of 64 hours in the preparation and trial of this matter, and that \$60.00 an hour is a reasonable charge for said attorney.

15. That the sum of \$455.71 costs have been expended in this action.

BASED UPON the foregoing Findings of Fact, the Court makes the following

#### CONCLUSIONS OF LAW

1. That the failure of the defendant to exercise the due-on-sale clause of the trust deed by recording the notice of default and initiating either a judicial or non-judicial trust deed foreclosure for approximately four years after notice of a sale in violation of the due-on-sale provision is not exercising the option within a reasonable time, which the law requires, and when no other time provision for the exercise of said right is specified in the trust deed.

2. That the failure of the defendant to accelerate the obligation under the due-on-sale clause until after plaintiff had foreclosed the rights of Gary Ford and had succeeded

to title to the property effects a waiver of defendant's right to proceed with their due on sale clause, and in addition thereto amounts to an estoppel against the defendant to proceed to foreclose at this time.

3. That the plaintiff's loan with the defendant was brought current by the payment of \$101,955.00 as of the 27th day of December, 1984.

4. That the defendant does not, by virtue of a due-on-sale clause in a trust deed, have carte blanche right to monitor the climate of interest rates for the period of said loan and at some point deemed most advantageous to the defendant require an adjustment or foreclosure from the borrower.

5. That the plaintiff is entitled to a permanent order restraining the defendant from proceeding with its trust deed foreclosure action, and further, requiring them to accept payments pursuant to the original terms of the trust deed and trust deed note signed in April of 1976.

6. That the plaintiff is entitled to the sum of \$3,840.00 as attorney's fees for the use and benefit of his attorney, plus \$455.71 as costs.

DATED this \_\_\_\_\_ day of April, 1985.

BY THE COURT:

\_\_\_\_\_  
Judge

APPENDIX "D"

HEBER GRANT IVINS  
Attorney for Plaintiff  
75 North Center  
American Fork, UT 84003  
Telephone: (801) 756-6071

IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR  
UTAH COUNTY, STATE OF UTAH

-ooo0ooo-

JACK S. COOPER,	)	
	)	JUDGMENT
Plaintiff,	)	
vs.	)	
	)	Civil No. 67,397
DESERET FEDERAL SAVINGS &	)	
LOAN ASSOCIATION,	)	
	)	
Defendant.	)	

-ooo0ooo-

THIS MATTER came on regularly for trial on the 28th day of February, 1985; the plaintiff appearing in person and through his counsel, Heber Grant Ivins; the defendant appearing with officers of the corporation and through their counsel, Joseph E. Hatch; the parties presented evidence and oral arguments to the Court; and the Findings of Fact and Conclusions of Law having heretofore been entered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the defendant be, and is hereby, ordered and enjoined from taking further action upon the foreclosure of the trust deed which has been commenced and is now pending, and

FURTHER, the defendant is ordered to accept and comply with the terms of the original trust deed and trust deed note executed by the plaintiff in April of 1976.

HEBER GRANT IVINS  
ATTORNEY AT LAW  
75 NORTH CENTER  
AMERICAN FORK, UT 84003  
TELEPHONE: (801) 756-6071

Plaintiff is entitled to and is hereby awarded judgment against the defendant in the amount of \$3,840.00 for the use and benefit of his attorney, together with \$455.71 in costs.

DATED this 17<sup>th</sup> day of May, 1985.

BY THE COURT:

LS/  
Judge

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of February, 1986, I mailed four (4) true and correct copies of the foregoing Brief of Appellant, postage prepaid, to:

Mr. Heber Grant Ivins  
Attorney at Law  
75 North Center Street  
American Fork, Utah 84003

---